Supreme Court, U.S.
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No. _____

In the Supreme Court of the United States

TECHNICAL ORDNANCE, INC., a Minnesota corporation, and NORMAN H. HOFFMAN, individually,
Petitioners,

vs.

DOUGLAS MOORE, special agent of the Bureau of Alcohol, Tobacco, and Firearms, U.S. Department of the Treasury,
Respondent,

and

JOHN DOE 1 through JOHN DOE V, unknown named agents of the ATF, and the UNITED STATES OF AMERICA,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Eighth Circuit, in an interlocutory qualified immunity appeal presenting no issue of law, exceeded the scope of its jurisdiction when it overrode the trial court's factual findings and reversed its holding that genuine issues of material fact necessitated a trial.

2. Whether the Eighth Circuit, in an interlocutory appeal of the denial of summary judgment on qualified immunity grounds, applied the wrong standard of review when it failed to view the evidence in the light most favorable to the non-moving party and concocted a version of the facts that was so contrary to the evidence that not even the moving party had ever advanced it.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The following parties are Petitioners and plaintiffs in the action below:

Technical Ordnance, Inc.
Norman H. Hoffman

Pursuant to Rule 29.6, Petitioners state that Technical Ordnance, Inc. is a Minnesota corporation with its principal place of business in St. Bonifacius, Minnesota. Norman H. Hoffman is the President of Technical Ordnance, Inc. The company has no parent corporations or subsidiaries, and there are no publicly held companies that hold more than ten percent of its stock.

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TEXT OF RELEVANT STATUTES

The pertinent text of the statutes and regulations at issue in this matter is reproduced in the Appendix ("App.") attached hereto. *See* App. 75-83. The provisions most significant to the disposition of this petition are as follows:

18 U.S.C. § 1001. Statements or entries generally

(a) Except as otherwise provided in this section, whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully –

(1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact;

(2) makes any materially false, fictitious, or fraudulent statement or representation; or

(3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry;

shall be fined under this title or imprisoned not more than 5 years, or both.

* * *

18 U.S.C. § 842. Unlawful acts

* * *

(f) It shall be unlawful for any licensee or permittee willfully to manufacture, import, purchase, distribute, or receive explosive materials without making such records as the Secretary may be regulation require, including, but not limited to, a statement of intended use, the name, date, place of birth, social security number or taxpayer identification number, and place of residence of any natural person to whom explosive materials are distributed. If explosive materials are distributed to a corporation or other business entity, such records shall include the identity and principal

and local places of business and the name, date, place of birth, and place of residence of the natural person acting as agent of the corporation or other business entity in arranging the distribution.

* * *

PETITION FOR CERTIORARI

Petitioners Technical Ordnance, Inc. (Tech-Ord) and Norman H. Hoffman (Hoffman) respectfully petition this Court for a writ of certiorari to review a decision of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The United States District Court for the District of South Dakota issued four decisions denying defendant Douglas Moore's claims of qualified immunity: an April 14, 1997 order denying Moore's motion to dismiss, a May 19, 1997 order denying Moore's motion for reconsideration, a September 30, 1998 order denying Moore's first motion for summary judgment, and an October 29, 1999 order denying Moore's second motion for summary judgment. All of these decisions are unreported. The opinion of the United States Court of Appeals for the Eighth Circuit reversing the trial court is reported at 214 F.3d 641 (2001).

JURISDICTION

The Eighth Circuit issued its opinion on March 26, 2001. Petitioners then timely filed a Petition for Rehearing or for Rehearing En Banc, which the court denied on August 15, 2001. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations relevant to the disposition of this Petition are 28 U.S.C. § 1291; 18 U.S.C. § 1001; 18 U.S.C. § 842; and 27 C.F.R. § 55.141. App. 75-83.

STATEMENT OF THE CASE

I. Overview

This case arises from a campaign waged by a rogue special agent of the Bureau of Alcohol, Tobacco and Firearms ("ATF") to bring the full force of the federal government down upon a small defense contractor, Technical Ordnance, Inc. ("Tech-Ord"), and its president,

Mr. Norman Hoffman. Agent Douglas Moore prepared a warrant affidavit filled with accusations about the company that he knew to be false and used the affidavit to obtain search warrants permitting the ATF to raid the company's facilities. Moore continued his spurious campaign against Petitioners by repeating the same lies in a case report that convinced federal prosecutors to seek an indictment against Hoffman and Tech-Ord, in his testimony before a grand jury that resulted in a thirty-six count indictment against them, and in his testimony at the ensuing criminal trial.

Moore's web of deceit finally unraveled at the criminal trial, when he admitted that statements he made in his warrant affidavit were not true. On cross-examination, Moore retracted his false statements and the prosecution's case collapsed. Both Tech-Ord and Hoffman were duly acquitted on all charges. Before rendering the verdict, the jury took the extraordinary measure of requesting permission from the Court to make a public statement about the case. After the verdict, the jurors made statements expressing their disbelief that the government had brought the charges because the government presented no evidence to show that Hoffman or Tech-Ord committed any crime.

Petitioners then brought this civil action against Moore under *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971). Moore attempted to avoid having to stand trial for his misconduct by repeatedly filing motions in the trial court seeking dismissal of Petitioners' claims on qualified immunity grounds. Each time, the trial court rejected Moore's requests based on the sufficiency of Petitioners' allegations and the evidence presented. The trial court held, both before and after discovery, that there was more than sufficient evidence for a jury to conclude that Moore knowingly made material false statements and omissions in his warrant affidavit and that, given these false statements, the affidavit was not supported by probable cause to believe that either Hoffman or the company committed any crime.

On the eve of trial, however, Moore appealed to the Eighth Circuit. Despite the interlocutory nature of the appeal, the Eighth Circuit undertook a broad-ranging independent review of the factual findings made by the trial court. The court did not review any conclusions of law made by the trial court, but instead disagreed with its factual determination that a jury could find Moore's statements in his affidavit to be false. In short, the Eighth Circuit reversed the trial court's holding that genuine issues of material fact precluded granting summary judgment in favor of Moore.

II. Statement of Facts

A. The Nature of Tech-Ord's Business and the ATF's Knowledge Thereof

Tech-Ord is a small business based in St. Bonifacius, Minnesota that manufactures and sells defense articles, including propellant actuated devices ("PADs"). App. 172. Tech-Ord performs the vast majority of its work under contracts with the U.S. Department of Defense ("DOD"), in most cases as a subcontractor. *See* App. 134-35, 186. The company also sells some of its products to approved foreign governments pursuant to export licenses obtained from the U.S. Department of State.[1] According to a government form prepared by Tech-Ord in 1990, the company's non-DOD sales accounted for only 8.2% of its gross revenue. *Id.*

It is undisputed that the ATF lacks jurisdiction over sales made under contracts with the Department of Defense,

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[1] These foreign sales have been referred to by the parties under a variety of labels, including "foreign military sales" and "commercial sales." For clarity, this Petition will refer to sales under Department of Defense contracts as "DOD sales" and sales to foreign governments as "non-DOD sales." The record is clear that although the parties at times used different language to refer to these transactions, each party understood exactly what the other meant by the terms used. App. 47, 165 (Moore admitting that when Hoffman used the term "foreign military sales," Moore understood him to be referring to the transactions that ATF labels "commercial sales" – *i.e.*, non-DOD sales); *see also* App. 144.

including sales made under subcontracts with DOD prime contractors. The ATF has jurisdiction over sales of certain types of items to foreign governments, but that jurisdiction does not extend to sales of PADs – which comprised most, if not all, of the company's non-DOD sales during the relevant time period. *See* 27 C.F.R. § 55.141(a)(8). Notwithstanding the lack of clarity regarding the extent of ATF jurisdiction over Tech-Ord's operations, however, the company avoided any disputes with the agency by obtaining an ATF license once the agency took the position in 1989 that the company's operations fell within the ATF's jurisdiction. App. 173.

Thus, the ATF was well aware, by at least 1988, that Tech-Ord engaged in both DOD sales and non-DOD sales. The ATF described the company's business in a February 10, 1989 report as follows:

> Most of Technical Ordnance's work is done for the United States government either as a prime contractor or as a subcontractor to another industry member. They also contract directly with some foreign governments and ship to them under State Department permits.

App. 186. In 1990 and 1991, the ATF inspected Tech-Ord's records and found that the company was in full compliance with all applicable regulatory requirements. App. 191-195. Thus, before 1992, the ATF not only knew that Tech-Ord had disclosed that it engaged in non-DOD sales, it also knew that the company had obtained an ATF license for those sales and was satisfying the requirements of ATF regulations.

B. The Events of March 20, 1992

On March 20, 1992, Moore and another ATF agent came to Tech-Ord's manufacturing facility in Clear Lake, South Dakota, to conduct a surprise inspection. Their stated purpose was to investigate accidental explosions that had occurred earlier that year and check Tech-Ord's compliance

with the agency's prior request that it paint the angle iron in certain storage bunkers with non-static paint.

Upon Moore's arrival, he was met by Hoffman and another Tech-Ord representative, Mr. John Yuhas. Hoffman questioned whether the ATF had the authority to conduct the surprise inspection. Moore then inquired as to the nature of Tech-Ord's business, and Hoffman responded by telling Moore what he already knew: that Tech-Ord performed both DOD and non-DOD work. Moore then asked whether any non-DOD work was being performed at the facility at that time. To answer Moore's question, Hoffman and Yuhas retrieved a computer printout that listed all of the jobs in progress that day. The document showed that all of the work currently underway at the facility was being performed under a DOD contract or subcontract. App. 175, 183-184.

Thus, the only assertion that Hoffman made during this conversation was that Tech-Ord was not performing any non-DOD work at Clear Lake on the day of Moore's visit. Moore has admitted that this is how he understood Hoffman's remarks, given that Hoffman made the statements by reference to a computer run showing only the work that was being performed at Clear Lake on that day. App. 161, 162. Moore also knew that, regardless of whether the company was doing any non-DOD work that day, Tech-Ord in general conducted both DOD and non-DOD sales. App. 161 (admitting "I knew that ahead of time").

Following this exchange, Tech-Ord permitted the agents to conduct their inspection. Tech-Ord answered all of their questions about the prior explosions and escorted them on a tour of the facility. The agents inspected Tech-Ord's bunkers to verify that the angle irons had been painted as requested, and Tech-Ord even permitted them to peer into a bunker containing classified DOD material so that they could observe the angle iron. By the end of the day, the agents were satisfied that the company had adequately

addressed both of the issues that gave rise to the inspection: the painting of the angle irons and the accidental explosions that had occurred earlier that year. *See* App. 4.

Moore, however, displayed discernable indignation over Hoffman's questioning of the ATF's jurisdiction. Moore also took offense to the company's requests that he sign a guest register, wear a security badge, and wear safety footwear before entering certain areas. Moore refused to comply with any of these requests, even though they were required by applicable DOD rules and regulations. App. 174. Moore displayed his antagonism toward Hoffman by making threatening remarks, such as "do you realize that I wear a badge?," "do you know that I carry a gun?," and "do you understand that I can arrest people?" *Id.* Moore's animosity would develop into a personal vendetta against Hoffman and Tech-Ord that would lead him to devise a false account of the parties' discussions that day and then use that false account to pursue criminal charges against them.

C. Moore's False Warrant Affidavit

After the March 20, 1992 inspection, Moore prepared a warrant affidavit accusing Hoffman and Tech-Ord of making false statements in violation of 18 U.S.C. § 1001. Moore also asserted that, based on these false statements, the company must be out of compliance with the ATF's record-keeping regulations. Moore presented the affidavit to a U.S. Magistrate Judge on October 19, 1992 as grounds for permitting raids of Tech-Ord's facilities.

1. Moore's False Account of the Parties' Discussions on March 20, 1992

The central premise of Moore's affidavit was that Tech-Ord was attempting to avoid ATF jurisdiction over its operations by falsely claiming during the March 20, 1992 inspection that it performed all of its work under DOD contracts and did not perform any non-DOD work. According to the affidavit, Tech-Ord claimed that it "was not

engaged in any" non-DOD work and was "only involved in" DOD contracts. App. 146 & 147. As set forth in detail above, Tech-Ord never made any such assertion, and in fact stated just the opposite: that it performed both DOD and non-DOD work. As a result, Moore's assertion that Tech-Ord misstated the nature of its business was patently false.

Moore then contrasted Hoffman's alleged claim that Tech-Ord performed only DOD work with information showing what all the parties already knew: that Tech-Ord also performed non-DOD work. App. 146 & 147. In this manner, Moore was able to accuse Hoffman of lying by attributing to him a statement that he never made. Thus, it was *Moore* who lied by putting words in Hoffman's mouth and then using those imputed words to falsely state that there was reason to believe that *Hoffman* had lied.

Much of the argument between the parties in this case centers around Moore's use of the word "currently" in his affidavit. Although Moore twice stated in the affidavit that Tech-Ord claimed generally that it was not performing any non-DOD work, Moore also stated at one point in the affidavit that Tech-Ord claimed that it was not "currently" performing any such work. App. 139-140. Moore has made clear, however, that he intended all of these statements to be consistent with one another, because of what he meant when he used the term "currently." Moore claims that he understood Tech-Ord's statement that it was not "currently" performing any non-DOD work to mean that "while the company had engaged in [such sales] in the past, it had not done so recently, was not doing so now, and had no plans to [do so] in the foreseeable future." Apt. Br. at 32.

Thus, it is undisputed that Moore's affidavit conveyed that Tech-Ord was claiming that it did not perform any non-DOD work in general—not just that it was not doing any non-DOD work on March 20, 1992. As the trial court concluded, the "clear implication" of the affidavit "is that Hoffman had falsely portrayed matters and that Hoffman

was claiming that his entire operation fell under the purview of the DOD exemption." App. 28. Again, that assertion was manifestly false, in that Hoffman and Tech-Ord consistently had stated that the company performed both DOD and non-DOD work.

2. Moore's Finding of Probable Cause To Believe that Hoffman and Tech-Ord Violated the Law

Once Moore had falsely accused Hoffman of lying, it was very easy for him to draw the conclusion that Hoffman and Tech-Ord had violated federal law. This is because both of the crimes that Moore accused Hoffman and Tech-Ord of committing were directly based on the alleged false statements. First, Moore asserted that there was probable cause to believe that Hoffman made false statements in violation of 18 U.S.C. § 1001, which makes it a crime to make any materially false statement to a government official. To establish a violation of this statute, Moore simply repeated his false accusation that Hoffman had lied:

> Norman Hoffman . . . stated that the company was not engaged in any commercial sales [*i.e.*, non-DOD sales] or transactions of explosives, specifically sales to foreign customers or governments. Hoffman sated that he was only involved in U.S. Department of Defense government contracts and therefore exempt from ATF jurisdiction and record keeping. App. 146.

Second, Moore asserted that the very same allegedly false statements supported probable cause to believe that Tech-Ord had violated 18 U.S.C. § 842(f), which requires a party who holds an ATF license to maintain records in accordance with ATF regulations. To make out a case for this violation, Moore repeated his allegation that Hoffman had falsely claimed that "all activities at the Clear Lake facility were related to U.S. Department of Defense contracts and therefore exempt from ATF regulation." Moore then concluded that given these alleged false statements, "either

no records are being maintained" for the company's non-DOD work "or false records are being maintained to conceal the activity and give the appearance that the transactions are exempted under government contract obligations." App. 147-148.

Based on these alleged violations, Moore warranted that he had reason to believe that Tech-Ord was concealing certain property, including records and explosives sold in violation of federal law. App. 136. Moore's affidavit and a materially identical affidavit were presented to federal magistrate judges in South Dakota and Minnesota on or about October 19, 1992. The warrants then were issued on the basis of Moore's false accusations, permitting twenty-one federal agents to descend upon Tech-Ord's two facilities on October 21 to 22, 1992, to conduct search raids for the "concealed property" that allegedly would show illegal activity by Hoffman and Tech-Ord. *See* App. 136, 180.

D. Moore's Enduring Campaign Against Petitioners

The raids produced no credible evidence of any illegal activity by Hoffman or Tech-Ord. Nonetheless, Moore was able to continue the criminal process against them by perpetuating the same lies he originally made in his warrant affidavit. Moore persisted in his assertions that Tech-Ord was attempting to sidestep the ATF's jurisdiction by falsely claiming that all of its work was performed under DOD contracts. In February 1993, Moore prepared a criminal case report in which he again falsely alleged that Hoffman and Tech-Ord had attempted to conceal the fact that the company performed non-DOD work. App. 152 (alleging that Hoffman "made false statements claiming that Technical Ordnance, was *exclusively* engaged in DOD contracts and participated in *no activity* relating to commercial transactions") (emphasis added).

The false statements in the case report convinced federal prosecutors to seek an indictment against Hoffman and

Tech-Ord. Moore then testified before the grand jury, where he again falsely asserted that Hoffman had claimed that Tech-Ord conducted only DOD sales. App. 155 (testifying that Hoffman claimed: "I function entirely under the Department of Defense and therefore [am] exempt" from ATF regulation). Moore also made clear that the company's alleged lies were the entire basis for the government's case. App. 158 (testifying that Tech-Ord "has maintained all along they are not engaged in any commercial activity and that's basically the nature of this case").

Moore's false testimony caused the grand jury to return multiple indictments against Tech-Ord and Hoffman. Moore then served as a key witness for the prosecution in the criminal trial against Hoffman and Tech-Ord. Finally subjected to cross-examination, Moore was asked about the critical March 20, 1992 discussions between the parties. When asked whether Hoffman had stated that day that Tech-Ord performs both DOD and non-DOD work, Moore responded: "No. He said that he exclusively did nothing but Department of Defense contracts." App. 163. Asked the same question a second time, Moore again responded: "No. His words were, we do exclusively Department of Defense contracts." *Id.* Moore was asked the question a third time, and he yet again responded "No." *Id.*

Moore was then impeached, however, at which point he finally admitted the truth: that Hoffman in fact had stated on March 20, 1992 that the company engaged in both DOD and non-DOD work. When asked a fourth and final time whether Hoffman had stated on March 20, 1992 that the company engages in *both* DOD *and* non-DOD work, Moore finally recanted and responded "Yes." App. 165. Thus, Moore's testimony revealed that the entire basis for the criminal proceedings brought against Hoffman and Tech-Ord was a sham – an alleged false statement that Moore finally admitted was never made.

Moore's admission proved fatal to the prosecution's case. Hoffman and Tech-Ord were acquitted on all thirty-six counts. App. 166-169. After returning the verdict, the jury took the remarkable step of requesting permission from the judge to make a public statement about the case. App. 170. The jury members then spoke to the media to express their astonishment that the case had been brought; one juror noted that the case "should have been settled over coffee." App. 180, 197.

III. Proceedings Below

A. Proceedings Before the United States District Court for the District of South Dakota

Petitioners filed the current action in the United States District Court for the District of South Dakota on October 19, 1994. In their amended complaint, Petitioners asserted four counts against Moore and other unnamed agents under *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971), based on violations of their constitutional rights secured by the First, Fourth, and Fifth Amendments to the United States Constitution. App. 105-113.[2] Four times–in a motion to dismiss, a motion for reconsideration, and two motions for summary judgment–Moore asked the district court to dismiss the claims against him on the ground that he enjoys qualified immunity for his actions. Four times the district court rejected Moore's arguments.

In a decision dated April 14, 1997, the district court denied Moore's motion to dismiss on qualified immunity grounds. The court first noted that there was no dispute between the parties that making material false statements in a warrant affidavit violates clearly established law under the Fourth Amendment. App. 26; *see Franks v. Delaware*, 438 U.S. 154 (1978). The court then found that Petitioners' allegations

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[2] Petitioners also asserted three counts against the United States under the Federal Tort Claims Act, 28 U.S.C. §§ 1346, 2671 et seq., and requested an injunction preventing further harassment against them. App. 116-121

sufficiently set forth a violation of the Fourth Amendment under *Franks*. App. 29. In particular, the court pointed to Petitioners' allegations that while Moore claimed in his affidavit that Hoffman "stated that the company was not engaged in any" non-DOD sales and was "only involved in" DOD sales, Moore later admitted at the criminal trial that Hoffman had in fact told him (Moore) that the company was engaged in both DOD sales and non-DOD sales. App. 28.

Moore sought reconsideration of the court's order, arguing, among other things, that Petitioners' allegations were too "conclusory" to survive a motion to dismiss. The trial court responded by order dated May 19,1997 that the allegations were "anything but conclusory" and denied Moore's motion. App. 39. Moore then filed an appeal to the Eighth Circuit to challenge the trial court's denial of his motion to dismiss. Shortly before his brief was due, however, Moore abandoned the appeal. *See Technical Ordnance, Inc. v. Moore*, No. 97-3046SDP.

Back before the trial court, Moore filed a pre-discovery motion for summary judgment in which he again sought dismissal of the claims against him on qualified immunity grounds. Even without the benefit of a full discovery record, the trial court held in a decision dated September 30, 1998 that there was sufficient evidence to support Petitioners' claims. For example, the court determined that the evidence supported the conclusion that Moore:

> did not have any reasonable basis to believe that Hoffman had made a false statement. On the day of the inspection, he knew that Technical Ordnance was working on only DOD contracts. Hoffman told Moore, however, that Technical Ordnance manufactured and sold products both to fulfill DOD contracts and foreign military sales, which Moore knew included what ATF considered non-exempt commercial sales.

App. 56. The court also found that Moore's false statements were material in that, without them, "the affidavit fails to establish probable cause for the issuance of the warrant." *Id.* The court concluded that Moore was not entitled to qualified immunity, in that "[a] reasonable officer would have known there was no probability or even possibility of criminal activity." App. 57.

Moore again declined to obtain appellate review of the trial court's qualified immunity decision. Discovery then proceeded, and Petitioners gathered additional evidence establishing that the affidavit contained material false statements. After the completion of discovery, Moore again moved for summary judgment, and the court again denied Moore's motion on October 29, 1999. It found, based on the evidence presented, that "[a] reasonable trier of fact could conclude that Moore's affidavit was not based upon probable cause and was knowingly false." App. 63-64. Among other things, the court found that:

> During the inspection, Hoffman and the inspectors looked at current printouts of Technical Ordnance's jobs in progress which showed only exempt projects were being worked on at that time. Thus, Hoffman's statement that Technical Ordnance is "currently" working on only DOD contracts was not inaccurate and Moore knew that.

App. 63. Thus, the court held that Petitioners were entitled to a trial on their *Franks* claim.

On the eve of trial, however, Moore finally appealed to the Eighth Circuit. Upon learning that Moore intended to appeal, the trial court judge issued a memorandum to the parties stating: ". . . I do not believe there is any legal basis at all for an appeal (given that the Court has only determined that factual issues should be resolved at trial) . . . ." App. 130.

B. Proceedings Before the Eighth Circuit

The Eighth Circuit initially appeared to share the trial court's concern about whether the appeal was proper. The Clerk of Court notified the parties on December 29, 1999 as follows:

> This appeal has been sent to a panel of judges for review. You will be notified of any decision entered by the Court or whether a briefing schedule will be established.

App. 132. The court nonetheless allowed the appeal to go forward. As Petitioners later maintained in their brief on appeal, the only legal issues properly before the court related to their claims under the First Amendment and the common law tort of malicious prosecution. Although the court properly addressed these issues on appeal, it also chose to make a purely factual examination of Petitioners' *Franks* claim.

In its opinion, the Eighth Circuit reversed the trial court's holding that genuine issues of material fact precluded granting summary judgment in favor of Moore on Petitioners' *Franks* claim. Although Petitioners had argued in their brief that the court lacked jurisdiction over their *Franks* claim, the Eighth Circuit gave short shrift to the issue in its opinion. The court noted only that the fact issues identified by Petitioners were not, in its view, "material," and that the parties drew "differing legal conclusions from what was said and done." App. 8. In making this determination, however, the court overlooked the many disputes between the parties as to just "what was said and done." Instead, the court proceeded to present its own account of the facts, with barely any references to the record.

To reach its conclusion that Moore was entitled to qualified immunity, the court purged Moore's affidavit of any falsity by devising a wholly new account of what it was intended to convey. Although Moore himself had always

contended that Tech-Ord claimed that it performed only DOD work and thus was totally exempt from ATF jurisdiction, the Eighth Circuit found that "Moore never stated in his affidavit that Hoffman claimed that Ordnance only performed DOD contracts." App. 12. And although Moore had always admitted that his affidavit was intended to cast Hoffman's statement that the company was not "currently" performing any non-DOD work as a general statement going beyond the work being performed at the Clear Lake facility on March 20, 1992, the court found that "[t]he affidavit indicates that Moore understood Hoffman to say that Ordnance was not engaged in direct sales to foreign governments *on that day*." *Id.* (emphasis added). By imposing its own interpretation of the affidavit, the court was able to transform Moore's false statements into accurate ones and thereby grant him qualified immunity.[3]

Petitioners filed a Petition for Rehearing, noting that the "facts" set forth in the court's decision were contrary to the evidence of record and that the court had adopted a version of the evidence that Moore had never even advanced. The court ordered Moore to submit an answer to the petition. In his answer, Moore failed to address the fact that the Eighth Circuit's assessment of the facts was so favorable to Moore that it went beyond his own arguments. Moore also stopped short of agreeing with the Eighth Circuit's unfounded factual determinations, instead attempting to argue that Petitioners simply had taken the court's statements "out of context." The Eighth Circuit denied the petition, though Chief Judge Wollman would have granted it. App. 74.

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[3] The court also concluded that, even if the affidavit were amended to state that Tech-Ord had stated it generally performed some non-DOD work but maintained it was not performing such work at Clear Lake on March 20, 1992, Moore still would have had probable cause to believe that Hoffman and Tech-Ord had lied. In making this determination, however, the court once again ignored the disputed fact issues presented by the record and adopted a view of the evidence that went beyond any argument that Moore had ever made.

REASONS FOR GRANTING THE PETITION

This Court has clearly delineated the standards governing the scope of appellate jurisdiction and the proper standard of review in interlocutory appeals brought on qualified immunity grounds. The appellate courts, in general, have followed those standards to achieve a balance between the need for appellate review of qualified immunity determinations, on the one hand, and the need to maintain a clear division between the respective roles of trial courts and appellate courts in qualified immunity cases, on the other.

In this case, however, the Eighth Circuit turned those standards upside down by asserting jurisdiction over a case involving no question of law and then overriding the trial court's assessment of the evidence to reverse its holding that material fact issues remained for trial. The opinion thus defies the precedent of this Court and sharply conflicts with the decisions of other appellate courts on the proper scope of appellate review in an interlocutory appeal brought on qualified immunity grounds. The Court should grant certiorari to clarify the proper bounds of appellate review in a case such as this and restore the proper balance of authority between trial and appellate courts in qualified immunity appeals.

I. The Eighth Circuit Exceeded Its Authority By Taking Jurisdiction, Not To Resolve Any Issue Of Law, But Only To Dismantle The Trial Court's Factual Findings.

A. Appellate Courts Lack Jurisdiction To Review "Sufficiency Of The Evidence" Determinations By Trial Courts On The Issue Of Qualified Immunity.

Interlocutory orders, such as orders denying summary judgment, generally are not immediately appealable as of right. *Johnson v. Jones*, 515 U.S. 304, 309 (1995) (noting that "interlocutory appeals are the exception, not the rule"). This is because 28 U.S.C. § 1291 grants appellate courts

jurisdiction only over the "final decisions" of district courts. *Id.* A collateral order qualifies as a "final decision" only where it meets three requirements: it must conclusively decide the disputed question, resolve an important issue separate from the merits, and be effectively unreviewable on appeal from final judgment. *Id.* at 310-11; *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949).

Johnson also explained how the "final decision" requirement applies in qualified immunity appeals. The Court held that "a defendant, entitled to invoke a qualified-immunity defense, may not appeal a district court's summary judgment order insofar as that order determines whether or not the pretrial record sets forth a 'genuine' issue of fact for trial." *Id.* at 319-20. The Court further held that appellate jurisdiction exists over interlocutory orders denying qualified immunity only to the extent that they present "abstract questions of law." Thus, a trial court order rejecting a qualified immunity defense is immediately appealable only when "the issue appealed concern[s], not which facts the parties might be able to prove, but, rather, whether or not certain *given facts* showed a violation of 'clearly established' law." 515 U.S. at 311 (emphasis added); *Mitchell v. Forsyth*, 472 U.S. 511, 528 (1985).

Shortly after its ruling in *Johnson*, the Court confirmed in *Behrens v. Pelletier*, 516 U.S. 299 (1996) that appellate courts lack jurisdiction over mere "sufficiency of the evidence" questions:

> *Johnson* held, simply, that determinations of evidentiary sufficiency at summary judgment are not immediately appealable merely because they happen to arise in a qualified-immunity case; if what is at issue in the sufficiency determination is nothing more than whether the evidence could support a finding that particular conduct occurred, the question decided is not truly "separable" from the

> plaintiff's claim, and hence there is no "final decision" under *Cohen* and *Mitchell*.

Id. at 313 (citations omitted).

In sum, appellate courts presented with interlocutory appeals of trial court orders denying qualified immunity have jurisdiction only to review "abstract questions of law" —typically, whether the constitutional right at issue was "clearly established." *Behrens*, 516 U.S. at 313; *Garrett v. Startman*, 254 F.3d 946, 952 n.8 (10th Cir. 2001) (the "quintessential issue of law" is whether the right at stake was clearly established). Conversely, appellate courts lack jurisdiction where the sole question on appeal is the correctness of the trial court's determination that there was sufficient evidence to show that the particular conduct alleged by the plaintiff occurred. As this Court explained in *Johnson*, this approach strikes the proper balance between the respective roles of the trial and appellate courts:

> the issue at stake here–the existence, or nonexistence, of a triable issue of fact–is the kind of issue that trial judges, not appellate judges, confront almost daily. Institutionally speaking, appellate judges enjoy no comparative expertise in such matters.

515 U.S. at 315-16.

B. The Eighth Circuit Lacked Jurisdiction To Review The Trial Court's Determination That There Was Sufficient Evidence To Show That Moore Made Material False Statements In His Affidavit.

1. There Was No Legal Issue Before The Eighth Circuit Regarding Petitioners' *Franks* Claim.

In this case, there is no dispute that lying in a warrant affidavit to establish probable cause violates clearly established rights under the Fourth Amendment. *See Franks v. Delaware*, 438 U.S. 154 (1978). The Eighth Circuit acknowledged as much, and thus did not in any way

purport to base its jurisdiction on the question of whether the right at issue was sufficiently "clearly established." App. 9 ("A warrant issued on the basis of an affidavit that shows probable cause only because it contains a deliberate or reckless falsehood or omission violates the Fourth Amendment."). In fact, the Eighth Circuit did not reference a single legal issue through its entire discussion of Petitioners' *Franks* claim on which its jurisdiction might have been based. *See* App. 9-15.

The closest the court came to identifying a legal issue with respect to Petitioners' *Franks* was its somewhat cryptic statement that "[t]he parties do draw differing legal conclusions from what was said and done." App. 8. If this was intended as a reference to the fact that Moore argued that he was entitled to qualified immunity while Petitioners argued that he was not, that alone is not enough to vest the court with jurisdiction—particularly when the parties' difference of opinion stems from their divergent views of the evidence. *See supra* at 16-18; *cf. Canter v. County of Ostego*, 2001 WL 814937 (6th Cir. July 12, 2001) (attempts to couch appeal in terms of legal, rather than evidentiary, arguments rejected as "thinly-veiled attempts to challenge the correctness of the district court's conclusion regarding the sufficiency of the evidence"). Indeed, since the parties in every qualified immunity appeal will disagree on whether the defendant is entitled to immunity, such an all-encompassing rule would render every trial court denial of qualified immunity immediately appealable.

2. The Eighth Circuit's Analysis of Petitioners' *Franks* Claim Amounted To No More Than A Disagreement With The Trial Court's Review Of The Evidence.

Without any issue of law to address, the Eighth Circuit ventured into an independent analysis of the facts before the trial court. In doing so, the Eighth Circuit decided the very question it lacked jurisdiction to review: whether the trial

court had correctly determined that the evidence was sufficient to support the conclusion that the "particular conduct" alleged by Petitioners occurred. *See Behrens v. Pelletier*, 516 U.S. at 313.

The "particular conduct" alleged by Petitioners was simply that Moore made material false statements in his warrant affidavit. The trial court found sufficient evidence to support the conclusion that this particular conduct occurred, *i.e.*, that Moore lied in his warrant affidavit in order to show probable cause. For example, the trial court found that:

- While Hoffman stated that Tech-Ord performed both DOD and non-DOD work, Moore asserted in his affidavit that Hoffman had claimed that the company "was only involved in" DOD sales and "was not engaged in any" non-DOD sales. App. 28, 55-57.
- While Moore knew that Hoffman had asserted no more than that the company was performing only DOD work on March 20, 1992, Moore asserted in his affidavit that "Hoffman had falsely portrayed matters and that Hoffman was claiming that his entire operation fell under the purview of the DOD exemption." App. 28, 63.

These determinations by the trial court were entirely fact-based. The question of whether Moore lied in his affidavit involves a comparison of two purely factual matters: (1) what he knew, versus (2) what he conveyed in his affidavit. If Moore knew that Hoffman's statements were accurate, but prepared an affidavit accusing Hoffman of lying, then clearly Moore made false statements in his affidavit to procure a search warrant – a classic *Franks* violation. The trial court found that the evidence supported the conclusion that this was precisely what happened. App. 63 (holding that "Hoffman's statement that Technical Ordnance is 'currently' working on only DOD contracts was

not inaccurate and Moore knew that"). Thus, the trial court's holding with respect to Petitioners' *Franks* claim was a clear "sufficiency of the evidence" determination which the Eighth Circuit lacked jurisdiction to review.

Further, there can be no doubt that Moore's knowingly false statement (that Hoffman lied) was material to his finding that there was probable cause to believe that Petitioners violated the law. This is because the crime that Moore alleged Hoffman and Tech-Ord committed was the crime of lying to a federal official in violation of 18 U.S.C. § 1001. App. 146. All Moore had to do to fabricate a case that Hoffman violated the statute was to accuse Hoffman of lying to him. Indeed, it is hard to imagine a context in which an alleged false statement made to a federal agent could be more material to a probable cause determination than in the context of an alleged violation of 18 U.S.C. § 1001, which makes precisely that conduct a crime.[4]

In sum, the trial court found, based on its review of the evidence, that Moore accused Hoffman of making a statement that Moore knew Hoffman never actually made: that the company performed only DOD work and thus was entirely exempt from regulation by the ATF. The trial court further found that Moore's lie about Hoffman's supposedly false statement was material to his determination that there was probable cause to believe that Hoffman and Tech-Ord had lied and violated the law. Thus, the trial court correctly concluded that there were genuine issues of material fact with respect to Petitioners' *Franks* claim. Under the clear precedent of this Court, the Eighth Circuit lacked

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[4] The other crime that Moore accused Hoffman and Tech-Ord of committing was also directly tied to Hoffman's allegedly false statements. Moore asserted that because Hoffman had falsely claimed an exemption from ATF regulations by claiming that the company performed only DOD work, the company must be failing to maintain records as required by the ATF, which constitutes a violation of 18 U.S.C. § 842(f). App. 146-148.

jurisdiction to review this classic "sufficiency of the evidence" determination by the trial court.

C. The Eighth Circuit's Analysis Of Petitioners' *Franks* Claim Sharply Conflicts With The Decisions Of The Other Circuit Courts

The decision below stands apart from the other circuit courts that have addressed denials of qualified immunity in cases alleging Fourth Amendment violations under *Franks*. Other courts of appeal have correctly applied the precedent of this Court to refuse jurisdiction where the only issue presented is whether the plaintiffs' allegations, or the evidence presented, support the conclusion that the defendant made false statements in a warrant affidavit in order to establish probable cause.

In *Clanton v. Cooper*, 129 F.3d 1147 (10th Cir. 1997), for example, the plaintiff alleged that the defendant violated clearly established law by "knowingly including false information in a sworn affidavit." *Id.* at 1154. The trial court held that the plaintiff had sufficiently set forth a claim under *Franks* that the defendant made false statements in his affidavit to show probable cause. On appeal, the Tenth Circuit agreed that the plaintiff had set forth "a classic *Franks* violation" that was "clearly *legally* sufficient." *Id.* at 1154 (emphasis in original). The court also concluded, after carefully considering *Johnson* and *Behrens*, that it was without authority to second-guess the lower court's evaluation of the evidence:

> [W]e must scrupulously avoid second-guessing the district court's determinations regarding whether Clanton has presented *evidence* sufficient to survive summary judgment. Rather, we review only whether Cooper's conduct, as alleged by Clanton, violated clearly established law.

Id. at 1153 (citations omitted; emphasis in original). Thus, the court held that "the district court found there was a

genuine dispute over material facts and that is the kind of ruling that we lack jurisdiction to review in an interlocutory appeal." *Id.* at 1154-55 (*citing Johnson*, 515 U.S. at 313).

The courts of appeal have followed the same approach in reviewing denials of qualified immunity in other contexts. *See, e.g., Gross v. Pirtle*, 245 F.3d 1151, 1157-58 (10th Cir. 2001) (dismissing appeal for lack of jurisdiction where "genuine issues of material fact remain concerning whether [the defendant] had probable cause" and "further review would necessitate an assessment of the district court's evidentiary conclusions"); *Diaz v. Martinez*, 112 F.3d 1, 4-5 (1st Cir. 1997) (refusing jurisdiction over deliberate indifference claim where defendant was merely arguing "that the facts asserted by the plaintiffs are untrue, unproven, warrant a different spin, tell only a small part of the story, and are presented out of context"); *Genas v. State of New York*, 75 F.3d 825 (2d Cir. 1996) (declining to take jurisdiction over retaliation claim where trial court "found that a factual dispute exited as to whether defendant intended to retaliate against plaintiff").

Thus, the Eighth Circuit's assertion of jurisdiction in this case cannot be harmonized with the decisions of its sister courts. While the other courts of appeal have properly applied the standards set forth by this Court governing appellate review of qualified immunity determinations, the Eighth Circuit defied those standards and exceeded the scope of its jurisdiction.

II. The Eighth Circuit Ignored The Proper Standard Of Review By Failing To View The Evidence In The Light Most Favorable To Petitioners And Adopting A Version Of The Facts That Moore Never Advanced.

The only way that the Eighth Circuit could create the semblance of a legal issue with respect to Petitioners' *Franks* claim was by devising its own version of the facts and then treating those "facts" as undisputed. By misstating the evidence and failing to view the facts in the light most

favorable to Petitioners, the court turned the standard of review in summary judgment cases on its head. *See Behrens*, 516 U.S. at 309 (courts must view the evidence "in the light most favorable to the plaintiff" in qualified immunity appeals); *Mendenhall v. Riser*, 213 F.3d 226, 230 (5th Cir. 2000) (holding that appellate courts in qualified immunity appeals must give the plaintiff "the benefit of the doubt with regard to any disputed issues of fact"), *cert. denied*, 531 U.S. 1071 (2001); *see also Saucier v. Katz*, 533 U.S. 194, 121 S.Ct. 2151, 2156 (2001) (holding, in appeal of denial of summary judgment in *Bivens* action, that the first step in the qualified immunity analysis is to determine whether "a violation could be made out on a favorable view of the parties' submissions").

A. The Eighth Circuit Misconstrued The Record To Find That A Corrected Affidavit Would Show Probable Cause.

The Eighth Circuit found that if Moore's affidavit were corrected to state that Tech-Ord had acknowledged that it engaged in non-DOD work but that no such work was being performed at Clear Lake on March 20, 1992, "the affidavit would still have contained probable cause that officers of the company had lied and were not keeping records required by ATF regulation." App. 12. To support this conclusion, the court culled a smattering of facts from the record, misconstrued them, and presented them in a light more favorable to Moore than even he had advocated.

First, the court found that, although Tech-Ord had stated on March 20, 1992 and two earlier dates that only DOD work was being performed at Clear Lake, "other information contradicted these assertions." App. 12-13. The supposedly contradicting information consisted of materials that the court construed as suggesting that the company performed most of its work under contracts with foreign governments and did very little DOD work. *Id.* The evidence shows, however, that around the relevant time period, only

approximately 8% of the company's revenue came from sales to foreign governments. App. 135. Further, although Moore knew that Tech-Ord's work as a subcontractor under DOD prime contracts was exempt from ATF regulation, he relied on information relating solely to Tech-Ord's DOD prime contracts (*see* App. 143)–which represent only a small percentage of the company's DOD work. Thus, at the very least, the record presents disputed facts regarding the extent of the company's non-DOD work. The Eighth Circuit erred by resolving these fact issues in favor of Moore.

The court also concluded that three other "facts" supported Moore's finding of probable cause–none of which Moore had ever relied on as supporting his probable cause determination. App. 13. Indeed, Moore could not have made any such assertions consistent with the evidence:

- The court noted that accidental explosions had occurred at Clear Lake, which Tech-Ord reported to DOD but not to the ATF. The evidence before the trial court shows, however, that (1) Tech-Ord did inform the ATF about the explosions, but was told that no ATF report was necessary (*see* App. 140), and (2) the explosions occurred on assembly lines involving only DOD work, so that Tech-Ord was only required to report them to DOD, as it did.

- The court stated that a Tech-Ord officer "lied to agents when he claimed that a bunker contained classified DOD materials." App. 13, 14. The evidence before the trial court shows, however, that Moore never disputed that the bunker at issue *did* in fact contain classified DOD materials. Although no work was being performed under that particular DOD contract at the time of Moore's visit, the classified materials remained in the bunker and retained their classified status. App. 96; *see* Industrial Security Manual for Safeguarding Classified Information (DOD 1987) at 7, 270-72. Indeed, contrary to the court's view of the evidence, Moore acknowledged

in his affidavit that Hoffman claimed a "DOD exemption based on the *storage* of classified materials," not on the existence of an ongoing DOD contract. App. 140.

- The court found that a DOD inspector had stated that Tech-Ord's records were in "total noncompliance." App. 13. The evidence before the trial court shows, however, that the DOD official (who was not in fact an "inspector") was referring only to DOD requirements, and had nothing to say about whether Tech-Ord complied with ATF requirements. Further, Moore knew, before submitting his affidavit, that an ATF Chief had found that Tech-Ord was in compliance with ATF records regulations. *See* App. 194-195.

B. The Eighth Circuit Rewrote The Affidavit To Omit Moore's False Statements.

The heart of the Eighth Circuit's misapprehension of the evidence lies in the following excerpt from its opinion:

> Moore never stated in his affidavit that Hoffman claimed that Ordnance only performed DOD contracts. The affidavit indicates that Moore understood Hoffman to say that Ordnance was not engaged in direct sales to foreign governments on that day.

App. 12. Thus, the court imposed its own interpretation of what Moore *understood* Hoffman to state and what Moore *intended* to convey in the affidavit—classic examples of fact questions that are reserved for decision by the finder of fact at trial, not by an appellate court on interlocutory appeal.

The court's conclusion that the affidavit conveyed that Moore understood Hoffman to be referring only to the work that the company was performing *that day* is truly remarkable when contrasted with Moore's own arguments on appeal. Moore has always asserted just the opposite: that he intended to convey that Hoffman *was* claiming a general exemption from ATF regulation on the grounds that

the company performed exclusively DOD work. In fact, Moore has repeatedly chastised Petitioners for asserting that when Hoffman used the term "currently," he was referring only to the work being performed that day:

- . . . the word "*currently*" cannot possibly have meant "on that day only," as plaintiffs contend . . . .
- Nor is there any basis for the plaintiffs' assertion that when they told Moore and Kratichvil on March 20 that they were "*currently*" working only on DOD contracts, they meant "on that day only."
- Given these circumstances, no reasonable English speaker engaged in conversation with Hoffman and Yuhas would have understood them to mean "on that day only."
- The plaintiffs weakly suggest that the word "*currently*" had to mean "on that day only" . . . .

Apt. Br. at 16, 18, 32; Reply Br. at 8; (emphases in original).

Thus, Moore has disagreed with, and even ridiculed, the very notion that the Eighth Circuit accepted as an undisputed fact. Contrary to the Eighth Circuit's version of the facts, Moore had always argued that when Hoffman claimed that he was not "currently" performing any non-DOD work, he was claiming a full exemption from ATF jurisdiction on the grounds that the company did not perform any non-DOD work at all:

> a typical speaker of English would not understand them to be talking about <u>that day only</u>. Rather, that typical speaker of English would understand them to be saying that while the company had engaged in [non-DOD work] in that past, it had not done so recently, was not doing so now, and had no plans to [do so] in the foreseeable future.

Apt. Br. at 32 (emphasis in original).

This is the same interpretation that Moore gave to the words in his affidavit throughout the criminal proceedings against Petitioners. In his case report, Moore alleged that Hoffman "made false statements claiming that Technical Ordnance, was *exclusively* engaged in DOD contracts and participated in *no activity* relating to commercial transactions" App. 152 (emphasis added). Before the grand jury, Moore testified that Hoffman claimed: "I function entirely under the Department of Defense and therefore [am] exempt" from ATF regulation. App. 155; *see also id.* at 158 (testifying that Tech-Ord "has maintained all along they are not engaged in any commercial activity and that's basically the nature of this case"). Finally, before being impeached at the criminal trial, Moore testified that Hoffman "said that he exclusively did nothing but Department of Defense contracts" and that Hoffman's "words were, we do exclusively Department of Defense contracts." App. 163.

Thus, while the Eighth Circuit read the affidavit as conveying that Hoffman claimed only that Tech-Ord was performing solely DOD work on the day of March 20, 1992, the evidence and Moore's arguments and admissions make clear that he was asserting that Hoffman had claimed that the company in general did not perform any non-DOD work at all and was thus totally exempt from ATF regulation.

Indeed, any other interpretation would drain the affidavit of probable cause. Significantly, Moore has never asserted that there was probable cause to believe that Tech-Ord was performing non-DOD work on March 20, 1992. The record bears out that all of the work that Tech-Ord was performing that day was under DOD contracts, and Moore never had any reason to believe otherwise. App. 183-184, 175-176. Consequently, if the Eighth Circuit was correct in interpreting the affidavit to mean that Hoffman claimed only that Tech-Ord was performing solely DOD work on March 20, 1992, no probable cause existed for any search because Tech-Ord was not, in fact, performing any non-

DOD work on that day. Thus, the affidavit would support probable cause to believe that Hoffman lied only if his statements are understood as Moore has cast them: that Hoffman was claiming a broad exemption from ATF jurisdiction going beyond March 20, 1992, such that he would be falsely maintaining that Tech-Ord never did any non-DOD work.

The Eighth Circuit's interpretation of the affidavit also fails as matter of pure logic. As the court noted in its opinion, Moore stated that he asked Hoffman why Tech-Ord held an ATF license if the company performed only DOD work. App. 4. In addition, Moore stated in his affidavit that because Tech-Ord supposedly had claimed that it performed only DOD work, the company must be maintaining either false records or no records regarding its non-DOD work. App. 147-148. If Moore's affidavit were read to convey, as the Eighth Circuit has construed it, that Moore understood Hoffman to have claimed that Tech-Ord performed some non-DOD work but happened not to be doing any on that particular day, there would have been no reason for Moore to ask Hoffman why the company held an ATF license, and there would have been no basis for Moore to conclude that Tech-Ord was failing to maintain required records related to its non-DOD work. The only logical reading that gives meaning to the entire affidavit is the reading that Moore himself has always given it: that Tech-Ord was asserting that it did not perform any non-DOD work *at all* and thus was entirely exempt from ATF jurisdiction. *See United States v. Anderson*, 933 F.2d 612, 614 (8th Cir. 1991) (warrant affidavits are to be read "as a whole").

Finally, the Eighth Circuit's mischaracterization of the evidence is not saved by its view that any factual disputes between the parties as to what Hoffman said–and what Moore said that Hoffman said–are not material. This is because, again, the crime that Moore accused Hoffman and Tech-Ord of committing was making false statements to a

federal official. If Hoffman did not lie, and Moore knew that, then clearly Moore lacked probable cause to believe that Hoffman made a false statement in violation of 18 U.S.C. § 1001. Thus, in this context, there can be no dispute that Moore's false assertion that Hoffman lied was "material" to his finding of probable cause.

* * *

The Eighth Circuit's unsupported and one-sided assessment of the evidence should not be permitted to stand. By misstating the record and ignoring the many material fact disputes presented therein, the court defied the proper standard of review on summary judgment. The court not only failed to view the facts in the light most favorable to Petitioners, it went a step beyond and viewed the facts in a light more favorable to Moore than he had ever put forth.

Thus, the Eighth Circuit found a way to grant Moore qualified immunity in this matter only by turning the very nature of the case on its head. This case had always been about the fact that Moore prepared an affidavit in which he accused Hoffman of falsely stating that the company performed only DOD contracts. There had never been any question that Moore accused Hoffman of falsely claiming a full exemption from ATF jurisdiction on the grounds that the company did not perform any non-DOD work at all. On appeal, however, the Eighth Circuit construed the affidavit—contrary to the evidence and Moore's own arguments—as asserting only that Hoffman claimed that the company was not performing any non-DOD work on March 20, 1992. In this manner, the Eighth Circuit converted Moore's false statement into an accurate one, leading the court to the conclusion that Moore had not lied and therefore was entitled to qualified immunity.

CONCLUSION

For the reasons set forth above, Petitioners respectfully request that the Court grant this Petition.

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Respectfully submitted,

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